

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION**

LARRY EUGENE FORD,

Plaintiff,

v.

RON ANGELONE, et al.,

Defendants.

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Civil Action No. 5:01CV00077

MEMORANDUM OPINION

By: Samuel G. Wilson

Chief United States District Judge

Plaintiff Larry Eugene Ford brings this action pursuant to 42 U.S.C. § 1983 against Defendant Ron Angelone, Director of the Virginia Department of Corrections, and various other officers and employees of the Virginia Department of Corrections and the Virginia Parole Board. The court has jurisdiction pursuant to 28 U.S.C. § 1343. Ford claims that the defendants violated his constitutional rights by causing him to be imprisoned beyond the expiration of his court ordered sentence. The matter is before the court on defendants' motion to dismiss or, in the alternative, for summary judgment. On August 21, 2002, the court took defendants' motion under advisement and ordered the parties to address within fourteen days whether the claim was cognizable under the holding of Heck v. Humphrey, 512 U.S. 477 (1994). The defendants submitted a supplemental memorandum on September 3, 2002. Ford did not respond to the court's order. After considering the defendants' supplemental memorandum and conducting a thorough review of the applicable law, the court finds that defendants are entitled to the defense of qualified immunity. Accordingly, the court grants defendants' motion for summary judgment.

I.

According to the fact, on March 22, 1991, the Warren County Circuit Court sentenced Ford to serve five years in the penitentiary on each of three counts of distribution of cocaine in violation of

§ 18.2-248 of the Code of Virginia. The court suspended Ford's prison sentence and placed him on probation, so long as he complied with certain conditions. The order did not specify whether the sentence was to run concurrently or consecutively. Under Virginia law, sentences run consecutively unless the court states otherwise. Va. Code Ann. § 19.2-308 (2000). However, the court amended the order on May 30, 1991, ordering that Ford's sentences run concurrently, not consecutively. The practical effect was to change from fifteen years to five years the time Ford would serve if his suspended sentence was revoked by the court.

Ford was later arrested for violating the conditions of his suspended sentence. The Circuit Court revoked Ford's probation and ordered him to serve his suspended prison sentence. The parole board released Ford on discretionary parole on June 7, 1994, but on December 13, 1994, Ford was arrested again for violating his parole. At his parole hearing, Ford stated that the correct length of his sentence was five years. Nevertheless, Ford's parole was revoked and Ford was transferred to Buckingham Correctional Center to serve the balance of a fifteen year sentence.

Ford remained incarcerated in various institutions of the Virginia Department of Corrections from August 4, 1995 until September 28, 1999, when he was released. During his incarceration, Ford claims that he "attempted to bring the mistake in the length of his sentence to the attention and interest of the Parole Board and the classification and record-keeping functionaries of the Virginia Department of Corrections, but he was ignored." (Compl. ¶ 29.) On September 27, 1999, at Ford's fifth parole interview since his parole revocation in 1995, a parole board officer examined Ford's file and discovered the Warren County Circuit Court's second order purporting to change Ford's sentence to three concurrent five year sentences. Ford was then released from prison.

Ford claims numerous violations of his constitutional rights stemming from his allegedly

unlawful incarceration. Ford requests damages, declaratory and injunctive relief. Defendants have moved to dismiss, or in the alternative for summary judgment, arguing, among other things, that they are entitled to qualified immunity.

II.

Government officials are protected by qualified immunity “as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated.” Anderson v. Creighton, 483 U.S. 635, 638 (1987). Qualified immunity shields government officials “insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Thus, “[w]hen a plaintiff seeks to hold an official personally liable for his exercise of a discretionary function, the court must, in addressing the qualified immunity defense, consider whether the plaintiff has alleged a violation of law that was clearly established at the time the challenged actions were taken.” DiMeglio v. Haines, 45 F.3d 790, 794 (4th Cir. 1995). In addition, “[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.” Anderson, 483 U.S. at 640.

Here, the defendants were faced with two conflicting orders relating to Ford’s sentence. The first order, entitled “Order”, was entered March 22, 1991. This initial order did not explicitly state whether the three sentences should run concurrently or consecutively. However, Virginia Code § 19.2-308 provides that “when any person is convicted of two or more offenses, and sentenced to confinement, such sentences shall not run concurrently, unless expressly ordered by the court.” Va. Code Ann. § 19.2-308 (2000) (emphasis added). Therefore, the initial order of March 22, 1991 set the sentences to run consecutively.

The second order, entitled “Amended Order”, was entered May 30, 1991. Although titled as an amended order, this second order does not reference the initial order in any way. The second order contains language identical to the first order, except for the addition of the phrase “all these sentences to run concurrently and not consecutively” immediately following the three five-year sentences.

Rule 1:1 of the Rules of the Supreme Court of Virginia provides that a trial court loses jurisdiction over a case twenty-one (21) days after the date of entry of a final judgment or order. The date of entry is the date the order is signed by a judge. R. Va. Sup. Ct. 1:1 (2002). Orders entered after the twenty-one day period are void. See Rook v. Rook, 353 S.E.2d 756, 758 (Va. 1987). The May 30 “Amended Order” was entered more than 21 days after the March 22 “Order.” Therefore, the second order appears on its face to be void.

However, there is an exception to the 21 day limit on modifications of judgments and orders found in Virginia Code § 8.01-428. The exception allows modification of an order for correction of clerical mistakes resulting from oversight or inadvertent omissions. Va. Code Ann. § 8.01-428 (2000). Virginia’s appellate courts have been wary of permitting the modification of final judgments under this exception and have not allowed it to be used merely to elaborate the initial order. Hart v. Hart, 544 S.E.2d 366, 370 (Va. Ct. App. 2001). A modification under § 8.01-428 requires clear evidence that a mistake of oversight or inadvertence was made. Cass v. Lassiter, 343 S.E.2d 470, 473 (Va. Ct. App. 1986).

The court finds it unnecessary to delve any further into the validity of the two orders. Indeed, further consideration of the issue could implicate fundamental principles of federalism. It is sufficient to note that—given the applicable Virginia statutes, rules and case law—the defendants

reasonably could have believed that their decision to keep Ford incarcerated under the sentence set forth in the first Order was consistent with Ford's constitutional rights.¹ See Anderson, 483 U.S. at 640. Prison officials had a reasonable basis to conclude that Ford was required to serve a fifteen year sentence because the second order appeared void on its face. Thus, the question of which order was to be given effect was not "clearly established" as that term is used in qualified immunity analysis. It cannot be said that a reasonable official would have known the decision not to release Ford at the end of five years imprisonment violated any clearly established statutory or constitutional rights. Accordingly, the defendants are entitled to qualified immunity and summary judgment for the defendants is appropriate.

III.

For the reasons stated, the court will grant defendants' motion for summary judgment. An appropriate order will be entered this day.

ENTER: this January 9th, 2003.

CHIEF UNITED STATES DISTRICT JUDGE

¹ This case underscores the importance of state habeas corpus proceedings. Ford could have challenged his confinement in a state habeas proceeding at the end of five years imprisonment and thus afforded the Virginia courts an opportunity to determine the validity of the two orders. Unfortunately, he did not do so.

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FINAL ORDER

By: Samuel G. Wilson

Chief United States District Judge

For the reasons stated in the accompanying memorandum opinion, it is **ORDERED** and **ADJUDGED** that defendants' motion to dismiss or, in the alternative, for summary judgment is **GRANTED**. This action is stricken from the active docket of the court.

ENTER: this January 9th, 2003.

CHIEF UNITED STATES DISTRICT JUDGE